



**Dave Heineman**  
Governor

**STATE OF NEBRASKA**  
**DEPARTMENT OF NATURAL RESOURCES**  
**Ann Bleed**  
Director

May 25, 2007

IN REPLY TO:

Dear Surface Water Appropriator:

This letter is written to clarify the Department of Natural Resources' actions of the past few weeks regarding the regulating and closing notices received by you and others in the Niobrara Basin. The closing notices were required to administer water rights in the basin when the Nebraska Public Power District (NPPD) called for water for its hydroelectric plant near Spencer, Nebraska.

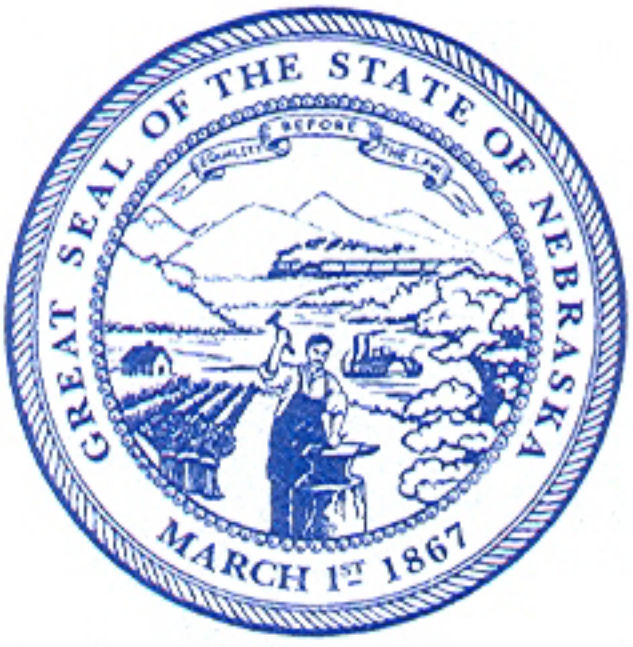
All surface water permits have a stated beneficial use, maximum allowable diversion, and priority date based on the date the application for the permit was received at the Department. An appropriation with an earlier priority date is considered to be senior to an appropriation with a more recent, junior, priority date. When there is not sufficient flow in the river for all appropriators, any senior appropriator may call the Department and ask that the Department administer the river to provide water to the senior appropriation. To provide the required amount of water to the senior appropriation, the Department will close a sufficient number of junior appropriators to provide the required amount of flow to the senior appropriator. Before issuing closing notices to junior appropriators, the Department will first check the river flow at the diversion point for the senior appropriator to determine whether in fact the flow is insufficient to meet the demand. The Department will also make sure that if water is provided to the senior, it will be beneficially used and not simply wasted past the diversion point. The Department will not close a junior appropriator simply to see water go unused by the calling senior.

On March 2, 2007 the NPPD sent a letter to the Department properly requesting that the Department administer the Niobrara River for their legal right to use the water of the Niobrara River in accordance with their water rights. NPPD has three appropriations for its Spencer hydroelectric plant for a total of 2,035 cubic feet per second of water for power production. The priority dates of NPPD's permits are 9/12/1896, 10/30/1923 and 6/8/1942. When NPPD requested administration the Department checked the river flow available to the hydropower plant to see if the flow was insufficient to meet the requirements of the permit. The Department also checked to make sure that any water that may be added to the river as a result of the priority call will be beneficially used by NPPD. On May 1 the Department determined that both these conditions were met and that the river needed to be administered for the NPPD 1942 right. At that time, the Department sent a closing notice to a sufficient number of junior appropriators to try to provide a sufficient amount of flow to the senior NPPD appropriation permits.

The Department will continue to monitor flows at the NPPD power plant. If either the stream flow increases so that junior appropriators do not have to be closed to provide the







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permitted water for the power plant or the power plant stops making beneficial use of the water for its permit, the Department will send out opening notices to allow junior appropriators to again divert water. In conformance with this practice, the Department sent opening notices to junior appropriators on May 7.

IN REPLY TO:

When issuing closing notices the Department must also consider the impacts of the so-called preference statutes. Under Section 70-669 of the Nebraska statutes and Article XV-6 of the Nebraska Constitution, the domestic use of water has a higher preference for use than an irrigation right and an irrigation right has a higher preference than an industrial right. This preference law gives the right of a permit holder with a junior but higher preference water right to enter into a subordination agreement with the senior lower preference appropriator so that the junior appropriation can take water ahead of the senior. The senior appropriator may require just compensation for the water taken out of priority by the junior appropriator. The subordination agreement is an agreement between the two appropriators, not with the Department. However, if irrigators junior to the NPPD appropriations sign a subordination agreement with NPPD, the holder of the subordination agreement will not be sent a closing notice by the department to provide water to NPPD even though NPPD has placed a call on the river. The junior may still be closed in order of priority for another irrigation appropriation.

On Friday May 11 we were requested by NPPD to refrain from putting a call on the river until July 1. Thus, until July 1, you will not receive a closing notice from the Department. After July 1 if flows are still sufficient to satisfy the NPPD permits, we will not send out any closing notices. If flows are below the permitted diversion quantities we will send closing notices to any junior appropriator that does not have a subordination agreement with NPPD.

It is our understanding that NPPD will be contacting you and the other irrigators in the basin shortly to inform you about how you may obtain a signed subordination agreement with NPPD. You may but are not required to enter into a subordination agreement with NPPD. Watch the Department's website ([www.dnr.ne.gov](http://www.dnr.ne.gov)) for any new information regarding water administration in the basin.

If you have any further questions, please feel free to contact Tom Hayden at the Department's Bridgeport field office (308-262-1930) or Tom Klanecky at the Department's Ord field office (308-728-3325) or Brian Dunnigan or Ann Bleed in Lincoln at 402-471-2366.

Sincerely,

Ann Bleed